With regard to that part of the Order of the High Court expressly declared to be made by consent, section 37(1)(b) of the Courts Ordinance, 1948, applies; that section expressly provides that no appeal shall be brought to the Court of Appeal where the judgment or order is made by consent of the parties.

With regard to that part of the Order awarding the plaintiff the sum of $30,000, as assessed by the learned Judge, the Court of Appeal was not competent to entertain the appeal (see *Robert Murray Burgess v. Andrew Morton*[1]).

For the above reasons the motion was dismissed.

Motion dismissed.

Solicitors for the appellant: *Leong Yew Koh & Co.*

Solicitors for the respondents: *Maxwell, Kenion, Cowdy & Jones.*

JAYAL SINGH v. LEONG YUNG KWOK.

[O. C. J. (Bellamy, J.) December 16, 1953]

[Malacca — Civil Suit No. 50 of 1952]

Moneylenders Ordinance (Cap. 218) & Moneylenders Ordinance, 1951 — Onus of proof — Some degree of system and continuity in moneylending transactions must be proved.

The plaintiff received a cheque for $5,000 from the defendant in consideration for loans that he had made from time to time to the defendant. The defendant having instructed his bankers to withhold payment of it the cheque was dishonoured when the plaintiff presented it for payment to the defendant's bankers. He now sues for the amount of the cheque. The only defence set up by the defendant is the plea that the plaintiff was a moneylender within the meaning of the Moneylenders Ordinances, at the relevant times.

Held: as there was sufficient evidence to prove some degree of system and continuity in moneylending transactions the plaintiff was prima facie a moneylender within the meaning of the Moneylenders Ordinances and as he has failed to prove to the contrary, the claim fails.

Cases referred to:—

(1) *Edgelow v. MacElwee* (1918) 1 K.B. 205.

(2) *Litchfield v. Dreyfus* (1906) 1 K.B. 584.

(3) *Newton v. Pyke* 25 T.L.R. 127.

(4) *Esmail Sahib v. Noordin* (1951) M.L.J. 98.

ACTION.

S. Shunmugam for the plaintiff.

C. S. Jayaswal for the defendant.

Cur. Adv. Vult.

Bellamy, J.: — By a specially indorsed writ issued on the 3rd day of November 1952 plaintiff sues the defendant for the sum of $5,000, the amount of a cheque drawn by the defendant on his bank, Hongkong and Shanghai Banking Corporation, Malacca branch, on the 1st September, 1952, payment therein being expressed to be to "cash or bearer". The plaintiff received this cheque from the defendant in consideration for loans that he had made from time to time to the defendant, and, having entered an appearance to the writ, the only defence set up by the defendant is the plea that the plaintiff was a moneylender within the meaning of the Moneylenders Ordinance (Chapter 218) and the Moneylenders Ordinance, 1951 at the times when he lent the defendant the moneys in respect of which the cheque sued upon was drawn and given to the plaintiff.

When the case came on before me for trial I ruled on the pleadings that the onus was on the defendant to satisfy me that the plaintiff was a moneylender as alleged.

There is no dispute that the plaintiff is, and at all material times was, a watchman in the employment of Chop Tong Yik Chan & Company, goldsmiths, of Nos. 3-5, Kampong Pantai, Malacca, and that the defendant, although at present unemployed, was at all material times one of the trustees of his late father's estate from which he derived, as trustee, an income of $500 a month, and that he lived, as he still does, in what has been described as the "family house" at No. 35, Tranquerah Pantai 2, Malacca.

The evidence of the defendant is that in August 1951 the plaintiff agreed to lend him $3,500 at interest at the rate of sixty per centum per annum, such interest to be payable monthly in advance. In pursuance of this agreement, on the 30th August, 1951, the plaintiff lent him $3,500, and having deducted $175 for interest as agreed, the plaintiff actually handed to him $3,325, and he drew a cheque for $3,500 on his bank, Hongkong & Shanghai Banking Corporation, Malacca branch, in favour of the plaintiff, post-dated the 30th September, 1951 and this cheque was given to the plaintiff by way of security for the loan.

On the day this cheque was payable, but before it was presented, the plaintiff met the defendant, and the defendant informed him that he still required the use of the money. The plaintiff then agreed to an extension of time for repayment of the loan and, having persuaded the defendant to draw a fresh cheque in his favour for the same amount, he received from the defendant $175 in cash, being a further month's interest in advance on the loan, and a cheque post-dated the 30th October, 1951, and the plaintiff thereupon

returned the first cheque to the defendant who defaced it.

In November 1951 the defendant repaid to the plaintiff $1,500 of the principal sum lent to him, and at the same time the plaintiff received from the defendant $100, being a further month's interest in advance on the amount of the loan still outstanding, and a third cheque drawn in his favour for $2,000 post-dated 30th December, 1951, and he returned the second cheque to the defendant who again defaced it.

In the beginning of December 1951 the defendant approached the plaintiff for a further loan, and the plaintiff lent him an additional $600 on the same terms as the original loan, in consideration of which the plaintiff received from the defendant a cheque dated 30th December, 1951 and drawn in his favour for $630. This was a temporary loan and was repaid.

On the 28th February, 1952 the defendant approached the plaintiff again for a further loan of $1,000, and the plaintiff lent him an additional sum of $1,000 on the same terms as previous loans, in consideration of which he received from the defendant a fresh cheque for $3,000 in his favour (which included the amount of the third cheque, namely, $2,000) and he returned the third cheque to the defendant who again defaced it. On the following day the defendant paid to the plaintiff $150, being a month's interest in advance on the total principal sum then outstanding.

In the meantime the defendant had borrowed moneys from the plaintiff's employer who, at the end of 1951, was pressing him for repayment, and in order to repay him, on the 16th January, 1952, he borrowed $2,000 at interest at the rate of twenty-four per centum per annum from one Leong Yip Kow, in consideration of which the defendant gave the said Leong Yip Kow a post-dated cheque for $2,000. This cheque was later returned to the defendant who drew a fresh one dated the 16th February, 1952 which he gave to the said Leong Yip Kow in lieu of the first cheque issued to him. At the end of February 1952 Leong Yip Kow was pressing the defendant for repayment of his money, and a meeting was arranged between the plaintiff's employer, the defendant and the said Leong Yip Kow. Nothing transpired at this meeting save that a further meeting was arranged. This second meeting took place two weeks later, and on this occasion the plaintiff was also present. At this meeting the plaintiff lent the defendant an additional sum of $2,000, with which he liquidated his debt to Leong Yip Kow who thereupon returned the second cheque which he had received to the defendant, and the defendant gave the plaintiff a cheque payable to "cash or bearer" for $2,000.

The defendant paid the April 1952 interest of $150 on the cheque for $3,000, but in May 1952 the plaintiff asked him to give him one cheque for $5,000 for the two cheques he still held. The defendant agreed, and having paid the May interest of $250 on both cheques and given the plaintiff his cheque for $5,000, his cheques for $3,000 and $2,000 were returned to him.

The defendant thereafter paid the June, July and August, 1952 interest on the principal sum of $5,000 owing to the plaintiff, and gave fresh cheques on each occasion to the plaintiff as hithertofore. On the 1st September, 1952 the defendant gave the plaintiff a fresh cheque (the cheque sued upon), but he was unable to pay the agreed interest as it fell due. He then asked the plaintiff to reduce the principal sum in view of the amount of interest he had paid, and threatened to stop payment of this cheque as the plaintiff refused to comply with his request. On the 18th September, 1952 the plaintiff presented the cheque for payment to the defendant's bankers at the branch I have mentioned, and the defendant having given his bankers instructions to withhold payment of it the cheque was dishonoured. On the 22nd September, 1952 the solicitor for the plaintiff gave notice in writing of dishonour to the defendant. As this notice failed to produce any tangible effect, save two payments towards the interest, the first a sum of $100 and the second $150 by cheque payable to "cash or bearer" by a friend of the defendant, the specially indorsed writ herein was issued.

In support of his case the defendant put in evidence the several cheques he had issued to the plaintiff.

The plaintiff admits the loans to the defendant and that he received the cheques from the defendant as he alleges, but he has denied that he received at any time any sums of money from the defendant as interest on the moneys he lent him. He asserts that he lent the moneys to the defendant as a "friend", and that he is not a moneylender within the meaning of the Moneylenders Ordinance.

Two issues arise for decision :—

(1) Did the plaintiff receive interest from the defendant as alleged by the defendant?

(2) If the answer to (1) is in the affirmative, was the plaintiff a moneylender within the meaning of the Ordinances at the relevant times?

As to the first issue, which is an issue of fact, the only evidence led before me was that of the parties themselves. The defendant could only speak of his

own transactions with the plaintiff, and I have no independent information as to the plaintiff's moneylending transactions with any other person. Having to choose between the conflicting versions of the plaintiff and the defendant, I unhesitatingly accept the evidence of the defendant. The defendant impressed me as a witness of truth. I am satisfied after hearing all that he said that it was agreed between him and the plaintiff that he should pay interest on the loans at the rate of sixty per centum per annum and that such interest was to be paid monthly in advance, and that such interest was in fact paid as he has sworn. His evidence is supported by the cheques which he gave the plaintiff each month, and by the evidence of Lee Song Kim (witness 2) who handed to the plaintiff his own cheque for the last payment of interest of $150. Much of the plaintiff's evidence was so preposterously untrue that I cannot rely on anything he says. I refer, in particular, to his evidence about his deposits with his employer's firm of which no accounts whatsoever were kept either by himself or his employer, Furthermore, there are several features of the case which militate against the version of the plaintiff. For instance, the issue of a fresh cheque each month, as to which the plaintiff gave no satisfactory explanation. He attempted to explain away the cheque of Lee Song Kim by saying that it was given by the defendant to his employers in payment of certain articles which he had brought, but it is to be observed that not a single question on those lines was at any time put in cross-examination either to the defendant or to Lee Song Kim who stated in the clearest terms that he gave that cheque to the plaintiff for the defendant as interest. I disbelieve the plaintiff who I am satisfied was not telling me the truth. I find as a fact that the plaintiff not only charged interest at the rate of sixty per centum per annum but that he received interest at that rate on the loans he made to the defendant.

Having found, as a fact, that the plaintiff did receive interest from the defendant, the next question is, is he a moneylender within the meaning of the Ordinance at the relevant times? It has been held that each case must be decided upon its own particular facts. It has furthermore been held that it is not sufficient to prove that the lender has occasionally lent money at a remunerative rate of interest; some degree of system and continuity in moneylending transactions must be proved (see *Edgelow v. MacElwee*[1]; *Litchfield v. Dreyfus*[2]; *Newton v. Pyke*[3], referred to in *Esmail Sahib v. Noordin*[4]). In this case the only evidence before me, as I have said, is of the defendant's transactions with the plaintiff. There can be no doubt, as I have found, that the plaintiff in his transactions with the defendant charged an extremely high rate of interest indeed. Under section 3 of either Ordinance the onus, therefore, shifts to the plaintiff to prove that he is not a moneylender. There were four separate loans to the defendant, three of them for substantial sums, and I have not lost sight of the fact that when someone was required to lend the defendant money — a sum of $2,000 — to pay off the loan to Leong Yip Kow, it was the plaintiff who was brought in by a man who was employing him as a watchman at a salary of $80 a month. This, in my view, shows that the plaintiff was known to some people in that neighbourhood, certainly by his employer, as a man both willing and able to lend money, and not trifling sum, at interest. Furthermore, I am satisfied on the evidence that the plaintiff's moneylending transactions had system and continuity. The plaintiff has not attempted to explain his insistence on receiving a fresh cheque on each occasion interest was paid. Furthermore, having regard to the difference in their station in life, to tell me that he lent these large sums of money to the defendant as a "friend" is to tell me something I do not believe. Upon these impressions made upon me by the evidence in this case I must hold that the plaintiff was *prima facie* a moneylender within the meaning of the Ordinances on the dates upon which he made the loans to the defendant and that he has not proved the contrary to my satisfaction.

That being my view, the plaintiff's claim fails.

There will be judgment for the defendant with costs. I direct that the cheque sued upon be returned to the defendant.

Judgment for the defendant.

Solicitor for the plaintiff: *S. Shunmugam.*

Solicitor for the defendant: *C. S. Jayaswal.*

MIN LIAN COMMUNICATION CO., LTD.
v.
C. H. HILL-WILLIS, HARBOUR MASTER, PERAK.

[O. C. J. (Thomson, J.) February 5, 1954]

[Ipoh — Civil Application No. 2 of 1954]

Merchant Shipping Ordinance, 1952, s. 475 — Construction of — Duty imposed on a Port Officer to license boats — His discretion and the limits imposed thereon.

The Port Officer, in this case the Harbour Master, Perak (respondent), had on December 23rd, 1953 written to the Company (petitioners) that, "on instructions received from the Perak State Executive Council he was